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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted] 244

ERNESTINE W. HUNT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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of the State of Arizona

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No. 1530 Misc.

ERNESTINE W. HUNT,

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STATE OF ARIZONA,

Respondent.

RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

THE STATE OF ARIZONA, by its Attorney General, GARY K. NELSON, by his assistant CARL WAAG, pursuant to Rule 24, Rules of the Supreme Court, 28 U.S.C., responds to the Petition for Writ of Certiorari heretofore filed.

OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's presentation of the above referenced matters in his petition.

QUESTIONS PRESENTED FOR REVIEW

1. The question is not, as stated by the petitioner, whether one is accorded due process of law if a federal district court must deny habeas corpus in all cases of a person tried in absentia. Nor is it true, as petitioner's statement of the question implies, that petitioner herein is ineligible for bail. She may be denied bail as a fugitive, but bail remains discretionary with the Court. The question is rather whether a state statute authorizing a criminal felony trial of a person who is

contumaciously absent from the state in violation of that person's undertaking and promise to attend trial is in conflict with the due process clause of the Fourteenth Amendment.

2. The record does present the third question petitioner claims it presents, but the facts on which she argues that question are not as she states them at page 20 of her petition. The State of Arizona had no knowledge that the Attorney General of Michigan was abandoning the appeal until the day the State of Arizona sought to intervene.

STATEMENT OF THE CASE

The decision of the Circuit Court states the case correctly, and that statement is adopted.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

The Arizona Rule of Criminal Procedure 231B, permitting trial in absentia of a felony defendant voluntarily absent throughout the proceedings, does not differ constitutionally from Federal Criminal Rule 43. The Federal Rule penalizes an accused who absents himself from his trial by requiring a forfeiture of his right of confrontation, his right to assist his counsel so as to make that counsel more effective, and his right to cross-examination to precisely the same extent as does the Arizona Rule. Such penalty by forfeiture of those rights has been approved by this Court in the promulgation of the Federal Rule. The only difference between the two rules is the fact that

the Federal Rule imposes the forfeiture only on a defendant who has been present at his trial and subsequently absents himself, where the Arizona Rule applies to one who absents himself voluntarily without reference to earlier attendance.

The State of Arizona does not question the petitioner's right to be present at her trial, per Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); nor her right to cross examination, per Pointer v. Texas, 380 U.S. 400 (1965); nor the right of confrontation, per Bruton v. United States, 391 U.S. 123 (1968). The State of Arizona did everything in its power to bring the petitioner before its court where she could be afforded due process. It is petitioner who absolutely refused to come to her trial, although it

was frequently continued at her request and for her convenience. It is petitioner's position that she may flaunt the authority of the State of Arizona and set its writ at naught; that the State of Arizona is without power to penalize her for so doing. Were this Court to promulgate a rule holding the State of Arizona so impotent, the State of Arizona could never again admit an accused to bail and reasonably anticipate seeing that accused in its court at the appointed time.

II

Petitioner's argument assumes the right on the part of an accused who has undertaken to attend his trial at a date set by the court to absent himself from the trial and defy the writ of the court issued to

secure his attendance. If petitioner is without such a right, then Arizona's Rule No. 231B, Rules of Criminal Procedure, deprives petitioner of nothing. It penalizes an accused for such behavior by forfeiture of certain of his rights which he cannot exercise while absent from the court, by permitting the judicial process to proceed in orderly fashion in his absence. This Court has upheld the power of the judiciary to impose such sanctions by the promulgation of Rule 43, Federal Rules of Criminal Procedure. See, Diaz v. United States, 223 U.S. 442 (1912).

A decision of this Court, reversing the Court of Appeals and upholding the District Court would necessarily be based on a holding that a federal trial may be

conducted in the absence of the accused, pursuant to Federal Criminal Rule No. 43, but that the Constitution forbids a state court to impose the same sanction for the same reason.

III

Petitioner argues the question on the premise that as to "* * * the underlying conviction * * * there is no question of its invalidity." (Petition for Writ of Certiorari, p. 13) The State of Arizona will concede that if there were no question of the validity of the petitioner's conviction, if she had been present at her trial and if Arizona had excluded her from the courtroon, prevented her from consulting her attorney, and deprived her of the right of confrontation and of cross examination, petitioner's arguments would be valid

and Sweeney v. Woodall, 344 U.S. 86 (1952) should not preclude the Circuit Court for Jackson County, Michigan, nor the District Court, from effecting her release. It is most unlikely, however, that under such circumstances the matter would ever reach the Circuit Court of Jackson County, Michigan, because it is rather unlikely that the Governor of Michigan would have issued his warrant for petitioner's arrest under such circumstances, or that the Attorney General of Arizona would have approved the Arizona Governor's unlikely request for rendition. The instant case is no proper vehicle for this Court's re-consideration of the rule of Sweeney v. Woodall, supra.

IV

The fact that, as petitioner believes, this is the only case on record in which the demanding state has been permitted to intervene in federal habeas corpus proceeding, is the natural result of the fact that it is the only case on record where the nominal respondent abandoned his right to appeal leaving the real party in interest, the government of a state, impotent to test the validity of an unprecedented ruling.

Petitioner argues her cause on a misstatement of the facts when she says "* * * Arizona authorities were aware for some time, through their participation as amicus, that the State of Michigan might not appeal, yet they deferred action until after expiration of the time for submission of the motion

under District Court rules."

The facts of the situation are as set forth in the opinion of the Court of Appeals, at pages 32 and 33 of the appendix to the petition. Arizona had no reason to believe that the nominal respondent would not appeal in the first instance, or that the Michigan Attorney General would decline to file the appeal documents on behalf of the real party in interest when the same were furnished to him for signature.

CONCLUSION

This Court should deny the petition for writ of certiorari herein and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GARY K. NELSON
The Attorney General

CARL WAAG
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the petitioner in the foregoing case by forwarding two (2) exact copies of response to petition for writ of certiorari in a sealed envelope, first class postage prepaid, and depositing same in the United States mail addressed to:

BEAUFORD JAMES GEORGE, JR
1133 Avenue of the Americas
New York, N.Y. 10036

CLARK SHANAHAN
310 W. Main Street
Owosso, Michigan 48867

this _____ day of August, 1969.

_____

SUBSCRIBED AND SWORN to before me this _____ day of August, 1969.

_____

My commission expires: